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IN THE SUPREME COURT OF THE UNITED STATES

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FLORIDA, ET AL. :

Petitioners : No. 11-400

v. :

DEPARTMENT OF HEALTH AND :

HUMAN SERVICES, ET AL., :

- - - - - x

Washington, D.C.

Wednesday, March 28, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

PAUL D. CLEMENT, ESQ., Washington, D.C.; on behalf of
Petitioners.

DONALD B. VERRILLI, JR., ESQ., Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
Respondents.

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P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will continue argument this afternoon in Case 11-400, Florida v. Department of Health and Human Services.

Mr. Clement.

ORAL ARGUMENT OF PAUL D. CLEMENT

ON BEHALF OF THE PETITIONER

MR. CLEMENT: Mr. Chief Justice, and may it please the Court:

The constitutionality of the Act's massive expansion of Medicaid depends on the answer to two related questions. First, is the expansion coercive? And, second, does that coercion matter?

JUSTICE KAGAN: Mr. Clement, can I ask you just a matter of clarification? Would you be making the same argument if, instead of the Federal Government picking up 90 percent of the cost, the Federal Government picked up 100 percent of the cost?

MR. CLEMENT: Justice Kagan, if everything else in the statute remained the same, I would be making the exact same argument.

JUSTICE KAGAN: The exact same argument. So that really reduces to the question of why is a big gift from the Federal Government a matter of coercion? In

1 other words, the Federal Government is here saying, we
2 are giving you a boatload of money. There are no --
3 there's no matching funds requirement, there are no
4 extraneous conditions attached to it, it's just a
5 boatload of federal money for you to take and spend on
6 poor people's healthcare. It doesn't sound coercive to
7 me, I have to tell you.

8 MR. CLEMENT: Well, Justice Kagan, let me --
9 I mean, I eventually want to make the point where, even
10 if you had a stand-alone program that just gave
11 100 percent, again, 100 percent boatload, nothing but
12 boatload, why there would still be a problem.

13 JUSTICE KAGAN: Yes. I mean, you do make
14 that argument in your brief, just a stand-alone program,
15 a boatload of money, no extraneous conditions, no
16 matching funds, is coercive?

17 MR. CLEMENT: It is. But before I make that
18 point, can I simply say that you built into your
19 question the idea that there are no conditions. And, of
20 course, when you first asked, it was what about the same
21 program with 100 percent matching on the newly eligible
22 mandatory individuals, which is how the statute refers
23 to them, and that would have a very big condition.

24 And the very big condition is that the
25 States, in order to get that new money, they would have

1 to agree not only to the new conditions, but the
2 government here is -- the Congress is leveraging their
3 entire prior participation in the program --

4 JUSTICE KAGAN: Well, let me give you a
5 hypothetical, Mr. Clement.

6 MR. CLEMENT: Sure.

7 JUSTICE KAGAN: Now, suppose I'm an
8 employer, and I see somebody I really like, and I want
9 to hire that person. And I say, I'm going to give you
10 \$10 million a year to come work for me. And the person
11 says, well, I -- you know, I've never been offered
12 anywhere approaching \$10 million a year. Of course, I'm
13 going to say yes to that.

14 Now we would both be agreed that that's not
15 coercive, right?

16 MR. CLEMENT: Well, I guess I would want to
17 know where the money came from. And if the money came
18 from --

19 JUSTICE KAGAN: Wow. Wow. I'm offering you
20 \$10 million a year to come work for me, and you are
21 saying that this is anything but a great choice?

22 MR. CLEMENT: Sure, if I told you, actually,
23 it came from my own bank account. And that's what's
24 really going on here, in part. And that's why it's not
25 --

1 JUSTICE KAGAN: But, Mr. Clement --

2 MR. CLEMENT: -- simply a matter of
3 saying --

4 JUSTICE KAGAN: Mr. Clement, can that
5 possibly be? When a taxpayer pays taxes to the Federal
6 Government, the person is acting as a citizen of the
7 United States. When a taxpayer pays taxes to New York,
8 a person is acting as a citizen of New York. And New
9 York could no more tell the Federal Government what to
10 do with the Federal Government's money than the Federal
11 Government can tell New York what to do with the moneys
12 that New York is collecting.

13 MR. CLEMENT: Right. And if New York and
14 the United States figured out a way to tax individuals
15 at greater than 100 percent of their income, then maybe
16 you could just say it's two separate sovereigns, two
17 separate taxes; but, we all know that in the real world,
18 that to the extent the Federal Government continues to
19 increase taxes, that decreases the ability of the States
20 to tax their own citizenry, and it's a real tradeoff.

21 JUSTICE SOTOMAYOR: Is that a limit on the
22 Federal Government's power to tax?

23 MR. CLEMENT: What's that?

24 JUSTICE SOTOMAYOR: Are you suggesting that
25 at a certain point, the States would have a claim

1 against the Federal Government raising their taxes
2 because somehow the States will feel coerced to lower
3 their tax rate?

4 MR. CLEMENT: No, Justice Sotomayor, I'm
5 not. What I'm suggesting is that it's not simply the
6 case that you can say, well, it's free money, so we
7 don't even have to ask whether the program's coercive.

8 JUSTICE SOTOMAYOR: Now, counsel, what
9 percentage does it become coercive? Meaning, as I look
10 at the figures I've seen from amici, there are some
11 states for whom the percentage of Medicaid funding to
12 their budget is close to 40 percent, but there are
13 others that are less than 10 percent.

14 And you say, across the board this is
15 coercive because no state, even at 10 percent, can give
16 it up. What's the percentage of big gift that the
17 federal government can give? Because what you're saying
18 to me is, for a bankrupt state, there's no gift the
19 federal government could give them ever, because it can
20 only give them money without conditions.

21 No matter how poorly the state is run, no
22 matter how much the federal government doesn't want to
23 subsidize abortions or doesn't want to subsidize some
24 other state obligation, the federal government can't
25 give them 100 percent of their needs.

1 MR. CLEMENT: And, Justice Sotomayor, I'm
2 really saying the opposite, which is not that every gift
3 is coercive, no matter what the amount, no matter how
4 small. I'm saying essentially the opposite, which is
5 there has to be some limit. There has to be some limit
6 on coercion.

7 And the reason is quite simple, because this
8 Court's entire spending power jurisprudence is premised
9 on the notion that spending power is different, and that
10 Congress can do things pursuant to the spending power
11 that it can't do pursuant to its other enumerated powers
12 precisely because the programs are voluntary. And if
13 you relax that assumption that the programs are
14 voluntary, and you are saying they are coercion, then
15 you can't have the spending power jurisprudence --

16 JUSTICE SOTOMAYOR: What makes them
17 coercive; that the state doesn't want to face its voters
18 and say, instead of taking 10, 20, 30, 40 percent of the
19 government's offer of our budget and paying for it
20 ourselves and giving up money for some other function?
21 That's what makes it coercive --

22 MR. CLEMENT: Well --

23 JUSTICE SOTOMAYOR: -- that the state is
24 unwilling to say that?

25 MR. CLEMENT: Maybe I can talk about what

1 makes it coercive by talking about the actual statute at
2 issue here and focusing on what I think are the three
3 hallmarks of this statute that make it uniquely
4 coercive.

5 One of them is the fact that this statute is
6 tied to the decidedly nonvoluntary individual mandate.
7 And that makes this unique, but it makes it significant,
8 I think.

9 I will continue. I thought you had a
10 question. I'm sorry.

11 The second factor, of course, is the fact
12 that Congress here made a distinct and conscious
13 decision to tie the state's willingness to accept these
14 new funds, not just to the new funds but to their entire
15 participation in the statute, even though the coverage
16 for these newly eligible individuals is segregated from
17 the rest of the program. And this is section 2001A3 at
18 page 23A of the appendix to the blue brief.

19 JUSTICE GINSBURG: Isn't that true of every
20 Medicaid increase? That each time -- I mean, and this
21 started quite many years ago, and Congress has added
22 more people and given more benefits -- and every time,
23 the condition is, if you want the Medicaid program, this
24 is the program, take it or leave it.

25 MR. CLEMENT: No, Justice Ginsburg, this is

1 distinct in two different directions. One is, in some
2 of the prior expansions of the program, but not all,
3 Congress has made covering newly eligible individuals
4 totally voluntary. If the states wants to cover the
5 newly eligible individuals, they will get the money;
6 but, if they don't, they don't risk any of their
7 existing participation programs.

8 The 1972 program was a paradigm of that. It
9 created this 209(b) option for states to participate.
10 This court talked about it in the Gray Panthers case.

11 There were other expansions that have taken
12 place, such as the 1984 expansions, where they didn't
13 give states that option; but, here's the second
14 dimension in which this is distinct, which is, here,
15 Congress has created a separate part of the program for
16 the newly eligible mandatory individuals. That's what
17 they called them.

18 And those individuals are treated separately
19 from the rest of the program going forward forever.
20 They are going to be reimbursed at a different rate from
21 everybody who's covered under the preexisting program.

22 Now, in light of that separation by Congress
23 itself of the newly eligible individuals from the rest
24 of the program, it's very hard to understand Congress's
25 decision to say, look if you don't want to cover these

1 newly eligible individuals, you don't just not get the
2 new money, you don't get any of the money under the --

3 JUSTICE BREYER: Where does it say that?

4 I'm sorry, where does it say that?

5 MR. CLEMENT: It says -- well, it -- where
6 does it say what, Justice Breyer?

7 JUSTICE BREYER: What you just said. You
8 said, Congress said, if you don't take the new money to
9 cover the new individuals, you don't get any of the old
10 money that covers the old individuals. That's what I
11 heard you say.

12 MR. CLEMENT: Right.

13 JUSTICE BREYER: And where does it say that?

14 MR. CLEMENT: It says it -- there's two
15 places where it says it.

16 JUSTICE BREYER: Yeah, where?

17 MR. CLEMENT: The 2001A3 makes it part of my
18 brief.

19 JUSTICE BREYER: Where is it in your brief?

20 MR. CLEMENT: That's at page 23 A --

21 JUSTICE BREYER: In the blue brief?

22 MR. CLEMENT: Blue brief.

23 JUSTICE BREYER: 23A. Okay. Thank you.

24 MR. CLEMENT: And this makes not the point
25 about the funding cutoff. This makes the point just

1 that these newly eligible individuals are really treated
2 separately forevermore.

3 JUSTICE BREYER: I want the part about the
4 funding cutoff.

5 MR. CLEMENT: Right. And there,
6 Justice Breyer --

7 JUSTICE BREYER: And that cite section is
8 what?

9 MR. CLEMENT: I don't have that with me --

10 JUSTICE BREYER: Well, I have it in front of
11 me.

12 MR. CLEMENT: Great. Perfect. Thank you.

13 JUSTICE BREYER: And I will tell you what I
14 have, what I have in front of me, what it says.

15 MR. CLEMENT: Right.

16 JUSTICE BREYER: And it's been in the
17 statute since 1965.

18 MR. CLEMENT: Exactly.

19 JUSTICE BREYER: And the cite I have is
20 42 U.S.C. Section 1396(c). So are we talking about the
21 same thing?

22 MR. CLEMENT: If that's the -- if that is
23 the provision that gives the secretary --

24 JUSTICE BREYER: Yeah, okay.

25 MR. CLEMENT: -- among other things --

1 JUSTICE BREYER: And here's what it says at
2 the end.

3 MR. CLEMENT: -- the authority to cut off
4 all participation in the program, yes.

5 JUSTICE BREYER: It says, "The secretary
6 shall notify the state agency" -- this is if they don't
7 comply -- "that further payments will not be made to the
8 state or, in his discretion, that payments will be
9 limited to categories under or parts of the state plan
10 not affected by such failure, which it repeats until the
11 secretary is satisfied that he shall limit payments to
12 categories under or parts of the state plan not affected
13 by such failure."

14 So, reading that in your favor, I read that
15 to say, it's up to the secretary whether, should a state
16 refuse to fund the new people, the secretary will cut
17 off funding for the new people, as it's obvious the
18 state doesn't want it, and whether the secretary can go
19 further. I also should think -- I could not find one
20 case where the secretary ever did go further, but I also
21 would think that the secretary could not go further
22 where going further would be an unreasonable thing to
23 do, since government action is governed by the
24 Administrative Procedure Act, since it's governed by the
25 general principle, it must always be reasonable.

1 So I want to know where this idea came from
2 that should state X say, "I don't want the new money,"
3 that the secretary would or could cut off the old money?

4 MR. CLEMENT: And, Justice Breyer, here's
5 where it comes from, which is from the very beginning of
6 this litigation, we've pointed out that what's coercive
7 is not the absolute guarantee that the secretary could
8 cut off every penny, but the fact that she could.

9 JUSTICE BREYER: All right. Now, let me
10 relieve you of that concern, and tell me whether I have.
11 That a basic principle of administrative law, indeed,
12 all law, is that the government must act reasonably.
13 And should a secretary cut off more money than the
14 secretary could show was justified by being causally
15 related to the state's refusal to take the new money,
16 you would march into court with your clients and say,
17 "Judge, the secretary here is acting unreasonably, and I
18 believe there is implicit in this statute, as there is
19 explicit in the ADA, that any such cut-off decision must
20 be reasonable."

21 Now, does that relieve you of your fear?

22 MR. CLEMENT: It doesn't for this reason,
23 Justice --

24 JUSTICE BREYER: I didn't think it would.

25 MR. CLEMENT: Well, but here's the reason.

1 Here's the reason, Justice Breyer, it doesn't.

2 One is, I mean, I don't know the opinion to
3 cite for that proposition.

4 Second is, we have been making in this
5 litigation since the very beginning this basic point,
6 the government has had opportunities at every level of
7 this system, and I suppose they will have an opportunity
8 today to say, "fear not, States, if you don't want to
9 take the new conditions, all you will lose is the new
10 money."

11 JUSTICE BREYER: And I said -- I said
12 because it could be, you know, given the complexity of
13 the act, that there is some money that would be saved in
14 the program if the States take the new money, and if
15 they don't take the new money there is money that is
16 being spent that wouldn't otherwise be spent. There
17 could be some pile like that.

18 It might be that the secretary could show it
19 was reasonable to take that money away from the states,
20 too.

21 JUSTICE SCALIA: Mr. Clement --

22 JUSTICE BREYER: But my point is, you have
23 to show reasonableness before you can act.

24 JUSTICE SCALIA: -- do you agree -- do you
25 agree that the government has to act reasonably? Do we

1 strike down unreasonable statutes? My God!

2 MR. CLEMENT: And, Justice Scalia, I mean --

3 JUSTICE SCALIA: The executive has to act
4 reasonably, that's certain, in implementing a statute;
5 but, if the statute says, in so many words, that the
6 secretary can strike the whole -- funding for the whole
7 program, that's the law, unreasonable or not, isn't it?

8 MR. CLEMENT: That's the way I would read
9 the law, Your Honor.

10 JUSTICE BREYER: Yeah, but I have a
11 number -- all right.

12 MR. CLEMENT: And if I could just add one
13 thing just to the discussion is the point that, you
14 know, this is not all hypothetical. I mean, in -- there
15 was a record in the district court, and there is an
16 Exhibit 33 to our motion to summary judgment. It is not
17 in the joint appendix. We can lodge it with the Court
18 if you'd like. But it's a letter in the record in this
19 litigation, and it's a letter from the secretary to
20 Arizona, when Arizona floated the idea that it would
21 like to withdraw from the CHIP program, which is a
22 relatively small part of the whole program.

23 And what Arizona was told by the secretary
24 is that if you withdraw from the CHIP program, you risk
25 losing \$7.8 billion, the entirety of your Medicaid

1 participation. So this is not something that we've
2 conjured up --

3 JUSTICE BREYER: All right.

4 JUSTICE KAGAN: Mr. Clement --

5 JUSTICE BREYER: To make you feel a little
6 better, I want to pursue this for one more minute.

7 There are cases, and many, of which
8 Justice Scalia knows as well, which uses the Holly Hill,
9 uses the same word as this statute: In the Secretary's
10 discretion. And in those cases, this Court has said,
11 that doesn't mean the Secretary can do anything that he
12 or she wants; but, rather, they are limited to what is
13 not arbitrary, capricious, and abuse of discretion, in
14 interpreting statutes, in applying those statutes, et
15 cetera.

16 End of my argument; end of my question.
17 Respond as you wish.

18 (Laughter.)

19 MR. CLEMENT: Well, Justice Breyer, I'm not
20 sure that the Court's federalism jurisprudence should
21 force States to defend on how a lower court reads Holy
22 Hill. I think that, really, right here, what we know to
23 an absolute certainty is that this Secretary -- this
24 statute gives the Secretary the right to remove all of
25 the State's funding under these programs.

1 And think about what that is, just --

2 JUSTICE SOTOMAYOR: Mr. Clement, do you
3 think that the Federal Government couldn't, if it chose,
4 Congress, say, the system doesn't work. We are just
5 simply going to rehaul it. It's not consistent with
6 how -- what we want to accomplish. We're just going to
7 do away with the system and start a new health care plan
8 of some sort. And, States, you can take the new plan,
9 you can leave them. We are going to give out 20 percent
10 less, maybe 20 percent more, depending on what Congress
11 chooses.

12 Can Congress do that? Does it have to
13 continue the old system because that is what the States
14 are relying upon, and it's coercive now to give them a
15 new system?

16 MR. CLEMENT: Justice Sotomayor, we are not
17 saying we have a vested right to participate in the
18 Medicaid program as it exists now. So, if Congress
19 wanted to scrap the current system and have a new one,
20 I'm not going to tell you that there is no possibility
21 of a coercion challenge to it; but, I'm not going to
22 say that it --

23 JUSTICE SOTOMAYOR: That's what I -- I want
24 to know how I draw the line, meaning --

25 MR. CLEMENT: Well, can --

1 JUSTICE SOTOMAYOR: -- I think the usual
2 definition of coercion is, I don't have a choice. I'm
3 not sure what -- why it's not a choice for the States.
4 They may not pay for something else. If they don't take
5 Medicaid, and they want to keep the same level of
6 coverage, they may have to make cuts in their budget to
7 other services they provide. That's a political choice
8 of whether they choose to do that or not.

9 But when have we defined the right or
10 limited the right of government not to spend money in
11 the ways that it thinks appropriate?

12 MR. CLEMENT: Well, Justice Sotomayor,
13 before -- I mean, I will try to answer that question,
14 too. But the first part of the question was, you know,
15 what if Congress just tried to scrap this and start over
16 again with a new program?

17 Here's why this is fundamentally different
18 and why it's fundamentally more coercive, because
19 Congress is not saying, we want to scrap this program.
20 They don't have a single complaint, really, with the way
21 that States are providing services to the visually
22 impaired and the disabled under pre-existing Medicaid.
23 And that's why it's particularly questionable why they
24 are saying that if you don't take our new money, subject
25 to the new conditions, we are going to take all of the

1 money you have previously gotten, that you have been
2 dependent on for 45 years, and you are using right now
3 to serve the visually impaired and the disabled --

4 JUSTICE GINSBURG: Mr. Clement, may I -- may
5 I ask you -- question another line.

6 You represent, what, 26 States?

7 MR. CLEMENT: That's right,
8 Justice Ginsburg.

9 JUSTICE GINSBURG: And we are also told that
10 there are other States that like this expansion, and
11 they are very glad to have it.

12 The relief that you are seeking is to say
13 the whole expansion is no good, never mind that there
14 are States that say, we don't feel coerced, we think
15 this is good.

16 You are -- you are saying that because you
17 represent a sizeable number of States, you can destroy
18 this whole program, even though there may be as many
19 States that want it, that don't feel coerced, that say
20 -- think this is a good thing?

21 MR. CLEMENT: Justice Ginsburg, that's
22 right, but that shouldn't be a terrible concern because,
23 if Congress wants to do what it did in 1972 and pass a
24 statute that makes the expansion voluntary, every State
25 that thinks that this is a great deal can sign up.

1 What's telling here, though, is 26 States,
2 who think that this is a bad deal for them, actually are
3 also saying that they have no choice but to take this
4 because they can't afford to have their entire
5 participation in this 45-year-old program wiped out, and
6 they have to go back to square one and figure out how
7 they are going to deal with the visually impaired in
8 their State, the disabled in their State --

9 JUSTICE SCALIA: Mr. Clement, I didn't take
10 the time to figure this out, but maybe you did. Is
11 there any chance that all 26 States opposing it have
12 Republican governors, and all of the States supporting
13 it have Democratic governors? Is that possible?

14 MR. CLEMENT: There's a correlation,
15 Justice Scalia.

16 JUSTICE SCALIA: Yes.

17 (Laughter.)

18 JUSTICE GINSBURG: Let -- let me ask you
19 another thing, Mr. -- Mr. Clement. Most colleges and
20 universities are heavily dependent on the government to
21 fund their research programs and other things, and that
22 has been going on for a long time. And then Title IX
23 passes, and a government official comes around and
24 say -- says to the colleges, you want money for your
25 physics labs and all the other things you get it for,

1 then you have to create an athletic program for girls.
2 And the recipient says, I am being coerced, there is no
3 way in the world I can give up all the funds to run all
4 these labs that we have, I can't give it up, so I'm
5 being coerced to accept this program that I don't want.

6 Why doesn't your theory -- if your theory is
7 any good, why doesn't it work any time something --
8 someone receives something that is too good to give up?

9 MR. CLEMENT: Well, Justice Ginsburg, there
10 is two reasons that might be different. One is, this
11 whole line of coercion only applies -- is only relevant,
12 really, when Congress tries to do something through the
13 spending power it couldn't do directly.

14 So if Congress tried to impose Title IX
15 directly, I guess the question for this Court would be
16 whether or not Section 5 of the 14th Amendment allowed
17 Congress to do that. I imagine you might think that it
18 did, and I imagine some of your colleagues might take
19 issue with that; but, that's -- that's the nature of the
20 question.

21 So one way around that would be, if Congress
22 can do it directly, you don't even have to ask whether
23 there is something special about the spending power.
24 That's how this Court resolved, for example, the Ferra
25 case about funding to -- to colleges.

1 JUSTICE GINSBURG: I'm trying to understand
2 your coercion theory. I know that there are cases of
3 ours that have said there is a line between pressure and
4 coercion, but we have never had, in the history of this
5 country or the Court, any Federal program struck down
6 because it was so good that it becomes coercive to be in
7 it.

8 MR. CLEMENT: Well, Justice Ginsburg, I'm
9 going -- to say the second thing about my answer to your
10 prior question, which is just I also think that, you
11 know, it may be that spending on certain private
12 universities is something, again, that Congress can do,
13 and it doesn't matter whether it's coercion. But when
14 they are trying to get the States to expand their
15 Medicaid programs, that's --

16 JUSTICE GINSBURG: Let's take -- let's take
17 public colleges.

18 MR. CLEMENT: Okay. Then there -- then
19 there may be some limits on that, I mean, but, again,
20 I'm not sure, even in that context, there might not be
21 some things Congress can do. It's a separate question.

22 But once we take the premise, which I don't
23 think there is a disagreement here, that Congress could
24 not simply, as a matter of direct legislation under the
25 commerce power or something, say, States, you must

1 expand your Medicaid programs, if we take that as a
2 given, then I think we have to ask the question of
3 whether or not it's coercive.

4 Now, you -- in your second question, you
5 asked, well, you know, I mean, where's the case that
6 says that we've crossed that line? And this is that
7 case, I would respectfully say --

8 JUSTICE BREYER: And isn't the covenant
9 going to apply, as well, to the 1980 extension to
10 children 0 to 6 years old, 1990 requiring the extension
11 for children up to 18? All those prior extensions, to
12 me, seem just as big in amount, just about as big in the
13 number of people coming on the rolls, and they all are
14 governed by precisely the same statute that you are
15 complaining of here, which has been in the law since
16 '65.

17 MR. CLEMENT: Justice Breyer, I don't think
18 that our position here would necessarily extend to say
19 the 1984 amendments, and let me tell you why. You know,
20 I'm -- I'm not saying that absolutely that's guaranteed
21 that's not coercive, but here's reasons why they're
22 different.

23 The one major difference is the size of the
24 program. I mean, the expansion of Medicaid since 1984
25 is really breathtaking. Medicaid, circa 1984, the

1 Federal spending to the States was a shade over
2 \$21 billion. Right now, it's \$250 billion, and that's
3 before the expansion under this statute.

4 JUSTICE KAGAN: Well, if you are right, Mr.
5 Clement, doesn't that mean that Medicaid is
6 unconstitutional now?

7 MR. CLEMENT: Not necessarily,
8 Justice Kagan. And, again, it's because we are not here
9 with a one trick pony. And this -- one of the
10 factors -- we point you to three factors that make this
11 statute uniquely coercive. One of them is the sheer
12 size of this program.

13 And, you know, if you want a gauge on the
14 size of this program, the best place to look is the
15 government's own number. Footnote 6, page 73 --

16 JUSTICE KAGAN: So, when does a program
17 become too big? I want you to -- give me a dollar
18 number.

19 MR. CLEMENT: \$3.3 trillion over the next 10
20 years. That's -- that --

21 JUSTICE KAGAN: I thought \$1 trillion.

22 JUSTICE BREYER: I'll tell you this number,
23 which I did look up, that the amount, approximately, if
24 you look into it -- as a percentage of GDP, it's big,
25 but it was before this somewhere about 2-point-something

1 percent, fairly low, of GDP. It'll go up to something a
2 little bit over 3 percent of GDP. And now go look at
3 the comparable numbers, which I did look at, with the
4 expansion that we're talking about before.

5 The expansion from 0 to 18 or even from 0 to
6 6. And while you can argue those numbers, it's pretty
7 hard to argue that they aren't roughly comparable as a
8 percentage of the prior program or as a percentage of
9 GDP.

10 If I'm right on those numbers or even
11 roughly right -- I don't guarantee them -- then would
12 you have to say, well, indeed, Medicaid has been
13 unconstitutional since 1964.

14 And if not, why not?

15 MR. CLEMENT: The answer is no, and that's
16 because we're here saying there are three things that
17 make this statute unique.

18 JUSTICE SCALIA: What are your second and
19 third? I'm on pins and needles to hear your second --

20 (Laughter.)

21 MR. CLEMENT: One is the sheer size. Two is
22 the fact that this statute uniquely is tied to an
23 individual mandate which is decidedly nonvoluntary. And
24 three is the fact that they've leveraged the prior
25 participation in the program, notwithstanding that

1 they've broken this out as a separately segregated fund
2 going forward, which is not --

3 JUSTICE KAGAN: So, on the third -- on the
4 third, suppose you had the current program and Congress
5 wakes up tomorrow and says we think that there's too
6 much fraud and abuse in the program, and we're going to
7 put some new conditions on how the States use this money
8 so we can prevent fraud and abuse, and we're going to
9 tie it to everything that's been there initially.

10 Unconstitutional?

11 MR. CLEMENT: No, I think that is
12 constitutional because I think that's something that
13 Congress could do directly. It wouldn't have to limit
14 that to the spending program. And I think 18 U.S.C. 666
15 is -- is a statute -- you know, it may -- it's in the
16 criminal code. It may be tied to spending, but I think
17 that's -- that's a provision that I don't think is
18 constitutionally called into question.

19 JUSTICE KAGAN: I guess I don't get the
20 idea. I mean, Congress can legislate fraud and abuse
21 restrictions in Medicaid, and Congress can legislate
22 coverage expansions in Medicaid.

23 MR. CLEMENT: Well, Justice Kagan, I think
24 there's a difference, but if I'm wrong about that and
25 the consequence is that Congress has to break Medicaid

1 down into remotely manageable pieces as opposed to
2 \$3.3 trillion over 10 years before the expansion, I
3 don't think that would be the end of the world. But I
4 really would ask you to focus on specifically what's
5 going on here, which is they take these newly eligible
6 people -- and that's a massive change in the way the
7 program works.

8 These are people who are healthy, childless
9 adults who are not covered in many States. They say,
10 okay, we're going to make you cover those. We're going
11 to have a separate program for how you get reimbursed
12 for that. You get reimbursed differently from all the
13 previously eligible individuals. But if you don't take
14 our money, we're going to take away your participation
15 in the program for the visually impaired and disabled.

16 If I may reserve the balance of my time.

17 CHIEF JUSTICE ROBERTS: Well, I'm -- I'm not
18 sure my colleagues have exhausted their questions, so --

19 JUSTICE SOTOMAYOR: I guess my greatest
20 fear, Mr. Clement, with your argument is the following:
21 The bigger the problem, the more resources it needs.
22 We're going to tie the hands of the Federal Government
23 in choosing how to structure a cooperative relationship
24 with the States. We're going to say to the Federal
25 Government, the bigger the problem, the less your powers

1 are. Because once you give that much money, you can't
2 structure the program the way you want. It's our money,
3 Federal Government. We're going to have to run the
4 program ourself to protect all our interests.

5 I don't see where to draw that line. The
6 uninsured are a problem for States only because they,
7 too, politically, just like the Federal Government,
8 can't let the poor die. And so, to the extent they
9 don't want to do that, it's because they feel
10 accountable to their citizenry. And so, if they want to
11 do it their way, they have to spend the money to do it
12 their way, if they don't want to do it the Federal way.

13 So, I just don't understand the logic of
14 saying, States, you can't -- you don't -- you're not
15 entitled to our money, but once you start taking it, the
16 more you take, the more power you have.

17 MR. CLEMENT: Well, Justice Sotomayor, a
18 couple of points. One is, I actually think that sort of
19 misdescribes what happened with Medicaid. I mean,
20 States were, as you suggest, providing for the poor and
21 the visually impaired and the disabled even before
22 Medicaid came along. Then all of a sudden, States --
23 the Federal Government said, look, we'd like to help you
24 with that, and we're going to give you money
25 voluntarily. And then over time, they give more money

1 with more conditions. And now they decide they're going
2 to totally expand the program, and they say that you
3 have to give up even your prior program, where we --
4 first came in and offered you cooperation, we're now
5 going to say you have to give that up if you don't take
6 our new conditions.

7 Secondarily, I do think that our principle
8 is not that when you get past a certain level, it
9 automatically becomes coercive per se. But I do think
10 when you get a program and you're basically telling
11 States that, look, we're going to take away
12 \$3.3 trillion over the next 10 years, that at that
13 point, it's okay to insist that Congress be a little
14 more careful that it not be so aggressively coercive as
15 it was in this statute.

16 And I would simply say that -- we're not
17 here to tell you that this is going to be an area where
18 it's going to be very easy to draw the line. We're just
19 telling you that it's exceptionally important to draw
20 that line, and this is a case where it ought to be easy
21 to establish a beachhead, say that coercion matters, say
22 there's three factors of this particular statute that
23 make it as obviously coercive as any piece of
24 legislation that you've ever seen, and then you will
25 have effectively instructed Congress that there are

1 limits, and you will have laid down some administrable
2 rules.

3 JUSTICE SCALIA: Mr. Clement, the Chief has
4 said I can ask this.

5 CHIEF JUSTICE ROBERTS: He doesn't always
6 check first.

7 (Laughter.)

8 JUSTICE SCALIA: As I recall your -- your
9 theory, it is that to determine whether something is
10 coercive, you look to only one side, how much you're
11 threatened with losing or offered to receive. And the
12 other side doesn't matter.

13 I don't think that's realistic. I mean, I
14 think, you know, the -- the old Jack Benny thing, Your
15 Money or Your Life, and, you know, he says "I'm
16 thinking, I'm thinking." It's -- it's funny, because
17 it's no choice. You know? Your life? Again, it's just
18 money. It's an easy choice. No coercion, right? I
19 mean -- right?

20 Now, whereas, if -- if the choice were your
21 life or your wife's, that's a lot harder.

22 Now, is it -- is it coercive in both
23 situations?

24 MR. CLEMENT: Well, yes. It is.

25 (Laughter.)

1 JUSTICE SCALIA: Really?

2 MR. CLEMENT: I would say that.

3 JUSTICE SCALIA: It's a tough choice.

4 And -- and --

5 JUSTICE KENNEDY: I thought you were going
6 to say that it's your money and your life.

7 (Laughter.)

8 MR. CLEMENT: And, well -- it is. But I
9 mean -- I might have missed something, but both of those
10 seem to be the hallmarks of coercion.

11 (Laughter.)

12 JUSTICE SCALIA: No, no, no. To say -- to
13 say you're -- when you say you're coerced, it means
14 you've been -- you've been given an offer you can't
15 refuse. Okay? You can't refuse your money or your
16 life. But your life or your wife's, I could refuse that
17 one.

18 (Laughter.)

19 JUSTICE SOTOMAYOR: Mr. Clement, he's not
20 going home tonight.

21 (Laughter.)

22 JUSTICE SCALIA: I'm talking about my life.
23 I think -- take mine, you know?

24 (Laughter.)

25 MR. CLEMENT: I wouldn't do that either,

1 Justice.

2 JUSTICE SCALIA: I won't use that as an
3 example.

4 Forget about it.

5 CHIEF JUSTICE ROBERTS: That's enough
6 frivolity for a while.

7 But I want to make sure I understand where
8 the meaningfulness of the choice is taken away. Is it
9 the amount that's being offered, that it's just so much
10 money, of course you can't turn it down, or is it the
11 amount that's going to be taken away if you don't take
12 what they're offering?

13 MR. CLEMENT: It's both, Your Honor. And I
14 think that that's -- I mean, there really is -- there
15 really is, you know, three strings in this bow. I mean,
16 one is the sheer amount of money here makes it very,
17 very difficult to refuse, because it's not money that,
18 you know, that's come from some -- you know, China or,
19 you know, from the -- the -- you know, the export
20 tariffs like in the old day. It's coming from the
21 taxpayers. So, that's part of it.

22 The fact that they're being asked to give up
23 their continuing participation in a program that they've
24 been participating in for 45 years as a condition to
25 accept the new program, we think that's the second thing

1 that's critical --

2 CHIEF JUSTICE ROBERTS: Well, why isn't that
3 a consequence of how willing they have been since the
4 New Deal to take the Federal Government's money? And it
5 seems to me that they have compromised their status as
6 independent sovereigns because they are so dependent on
7 what the Federal Government has done, they should not be
8 surprised that the Federal Government, having attached
9 the -- they tied the strings, they shouldn't be
10 surprised if the Federal Government isn't going to start
11 pulling them.

12 MR. CLEMENT: With all due respect,
13 Mr. Chief Justice, I don't think we can say that, you
14 know, the States have gotten pretty dependent, so let's
15 call this whole federalism thing off. And I just think
16 it's too important, because, again, the consequence --
17 if you think about it -- if -- the consequence of saying
18 that we're not going to police the coercion line here
19 shouldn't be that well, you know, it's just too hard, so
20 we'll give the Federal Congress unlimited spending
21 power.

22 The consequence ought to be, if you really
23 can't police this line, then you should go back and
24 reconsider your cases that say that Congress can spend
25 money on things that it can't do directly.

1 Now, we're not asking you to go that far.
2 We're simply saying that, look, your spending power
3 cases absolutely depend on there being a line between
4 coercion --

5 JUSTICE SOTOMAYOR: But could you tell me --

6 MR. CLEMENT: -- and voluntary action.

7 JUSTICE SOTOMAYOR: I don't understand your
8 first answer to Justice Kagan. You don't see there
9 being a difference between the Federal Government saying
10 we want to take care of the poor; states, if you do
11 this, we'll pay 100 percent of your administrative
12 costs.

13 And you said that could be coercion. All
14 right? Doesn't the amount of burden that the State
15 undertakes to meet the Federal obligation count in this
16 equation at all?

17 MR. CLEMENT: It -- it certainly can,
18 Justice Sotomayor. I didn't mean to suggest, in
19 answering Justice Kagan's question, that my case was no
20 better than that hypothetical. I mean, but it's in the
21 nature of things that I do think the amount of the
22 money, even considered alone, does make a difference,
23 and it's precisely because it has an effect on their
24 ability to raise revenue from their own citizens. So
25 it's not just free money that they are turning down if

1 they want to; it really is --

2 JUSTICE SOTOMAYOR: Counsel, if we go back
3 to the era of matching what a State pays to what a State
4 gets, Florida loses. It's citizens pay out much less
5 than what they get back in Federal subsidies of all
6 kinds. So you can't really be making the argument that
7 Florida can't ask for more than it gives, because it's
8 really giving less than it receives.

9 MR. CLEMENT: Well, then I'll make --

10 JUSTICE SOTOMAYOR: You don't really want to
11 go back to that point, do you?

12 MR. CLEMENT: Well, then I'll make that
13 argument on behalf of Texas.

14 (Laughter.)

15 MR. CLEMENT: But it's not -- it's not what
16 my argument depends on, and that's the critical thing.
17 It's one aspect of what makes this statute uniquely
18 coercive.

19 And I really think if you ask the question,
20 what explains the idea that if you don't take this new
21 money, you are going to lose all your money under what
22 you have been doing for 45 years to help out the
23 visually impaired and the disabled, nobody in Congress
24 wants the States to stop doing that. They are just
25 doing it, and it's purely coercive, to condition the

1 money. It's leverage, pure and simple.

2 JUSTICE KENNEDY: If the inevitable
3 consequence of your position was that the Federal
4 Government could just do this on its own, the Federal
5 Government could have Medicaid, Medicare, and these
6 insurance regulations, assume that's true, then how are
7 the interests of federalism concerned? How are the
8 interests of federalism concerned if, in Florida or
9 Texas or some of the other objecting States, there are
10 huge Federal bureaucracies doing what this bill allows
11 the State bureaucracies to do?

12 I know you have thought about that. I would
13 just like your answer.

14 MR. CLEMENT: I have, and I would like to
15 elaborate that the one-word answer is "accountability."

16 If the Federal Government decides to spend
17 money through Federal instrumentalities, and the citizen
18 is hacked off about it, they can bring a Federal
19 complaint to a Federal official working in a Federal
20 agency.

21 And what makes this so pernicious is that
22 the Federal Government knows that the citizenry is not
23 going to take lightly the idea that there are huge, new
24 Federal bureaucracies popping up across the country.
25 And so they get the benefit of administering this

1 program through State officials, but then it makes it
2 very confusing for the citizen, who doesn't like this.
3 Do they complain to the State official because it's
4 being administered by a State official in a State
5 building, or do they --

6 JUSTICE KAGAN: But, Mr. Clement, that is
7 very confusing because the idea behind cooperative
8 Federal/State programs was exactly a federalism idea.
9 It was to give the States the ability to administer
10 those programs. It was to give the States a great deal
11 of flexibility in running those programs. And that's
12 exactly what Medicaid is.

13 MR. CLEMENT: Well, that's exactly what
14 Medicaid was. The question is, what will it be going
15 forward?

16 And I absolutely take your point,
17 Justice Kagan. Cooperative federalism is a beautiful
18 thing. Mandatory federalism has very little to
19 recommend it because it poses exactly the kind of
20 accountability --

21 JUSTICE KAGAN: Cooperative federalism does
22 not mean that there are no Federal mandates and no
23 Federal restrictions involved in a program that uses
24 90 percent here, 100 percent Federal money. It means
25 there is flexibility built into the program subject to

1 certain rules that the Federal Government has about how
2 it wishes its money to be used.

3 It's like giving a gift certificate. If I
4 give you a gift certificate for one store, you can't use
5 it for other stores; but, still, you can use it for all
6 kinds of different things.

7 MR. CLEMENT: I absolutely agree that if
8 it's cooperative federalism and the States have choices,
9 then that is perfectly okay. But when -- that's why
10 voluntariness in coercion is so important. Because if
11 you force a State to participate in a Federal program,
12 then -- I mean, as long as it's voluntary, then a State
13 official shouldn't complain if a citizen complains to
14 the State about the way the State's administering a
15 Federal program that it volunteered to participate in.
16 But at the point it becomes coercive, then it's not fair
17 to tell the citizen to complain to the State official,
18 they had no choice.

19 But who do they complain to at the Federal
20 level? There's nobody there, which would be -- I'm not
21 saying it's the best solution to have Federal
22 instrumentalities in every State, but it actually is
23 better than what you get when you have mandatory
24 federalism, and you lose the accountability that is
25 central to the federalism provisions in the

1 Constitution.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 Mr. Clement.

4 General Verrilli.

5 ORAL ARGUMENT OF GENERAL DONALD B. VERRILLI, JR.

6 ON BEHALF OF THE RESPONDENTS

7 GENERAL VERRILLI: Mr. Chief Justice, and
8 may it please the Court:

9 The Affordable Care Act's Medicaid expansion
10 provisions will provide millions of Americans with the
11 opportunity to have access to essential health care that
12 they cannot now afford. It is an exercise of the
13 Spending Clause power that complies with all of the
14 limits set forth in this Court's decision in *Dole*, and
15 the States do not contend otherwise. The States are
16 asking this Court to do something unprecedented, which
17 is to declare this an impermissibly coercive exercise of
18 power --

19 JUSTICE SCALIA: What do you think we meant
20 in those dicta in several prior cases, where we've said
21 that the Federal Government cannot be coercive through
22 the Spending Clause? What -- what do you think we
23 were -- give us a hypothetical.

24 GENERAL VERRILLI: Yes. First, if I could
25 just try to be a little more precise about it,

1 Justice Scalia. I think what the Court said in Steward
2 Machine and in Dole is that it's possible that you might
3 envision a situation in which there's coercion.

4 JUSTICE SCALIA: Okay.

5 GENERAL VERRILLI: And the courts didn't say
6 much more, but I can think of something.

7 One example I could think of that might
8 serve as a limit would be a Coyle-type situation, in
9 which the condition attached was -- worked a fundamental
10 transformation in the structure of State government in a
11 situation in which the State didn't have a choice but to
12 accept it. But -- and so --

13 JUSTICE SCALIA: Anything else, so long
14 as you --

15 GENERAL VERRILLI: Well, but --

16 JUSTICE SCALIA: You are talking about
17 situations where they have to locate their State house
18 in some other city --

19 GENERAL VERRILLI: Or you may have no
20 legislature or something like that.

21 JUSTICE SCALIA: -- and they have no choice.
22 But, short of that, they can make the State do anything
23 at all?

24 GENERAL VERRILLI: Well, no. Dole -- the
25 Dole conditions are real. The germaneness condition in

1 Dole is real, for example. And so those --

2 CHIEF JUSTICE ROBERTS: But none of those
3 have addressed the coercion question.

4 GENERAL VERRILLI: Right.

5 CHIEF JUSTICE ROBERTS: So do you think it
6 would be all right for the Federal Government to say,
7 same program: States, you can take this, or you can
8 leave it; but, if you don't take it, you lose every last
9 dollar of Federal funding for every program?

10 GENERAL VERRILLI: I think that would raise
11 a germaneness issue, Mr. Chief Justice, but it's not
12 what we have here.

13 CHIEF JUSTICE ROBERTS: But there's no
14 coercion question at all?

15 GENERAL VERRILLI: Well, but I think -- I
16 think they are related. I think that the germaneness
17 inquiry in Dole really gets at coercion in some
18 circumstances, and that's why I think they are related;
19 but, we don't have that here.

20 And if I could, I would like to address --

21 CHIEF JUSTICE ROBERTS: No, I know we don't
22 have that here. How does germaneness get -- get
23 to coercion?

24 GENERAL VERRILLI: Well, because it gets to
25 be harder to see what --

1 CHIEF JUSTICE ROBERTS: That's germaneness;
2 there's no --

3 GENERAL VERRILLI: -- what the connection is
4 between getting you to do A and the money you are
5 getting for --

6 CHIEF JUSTICE ROBERTS: So it fails because
7 it is not germane; but, you are saying it would not fail
8 because it was coercive?

9 GENERAL VERRILLI: Well, I think that -- as
10 I said, I think they are really trying to get at the
11 same thing. And I -- but I do think it's quite
12 different here, and I would like to, if I could, take up
13 each of the --

14 CHIEF JUSTICE ROBERTS: No, no. I know it's
15 -- I know it's different here. I'm just trying to
16 understand if you accept the fact or regard it as true
17 that there is a coercion limit; or, that once the
18 Federal Government -- once you are taking Federal
19 Government money, the Federal Government money -- can
20 take it back, and that doesn't affect the voluntariness
21 of your choice?

22 Because it does seem like a serious problem.
23 We are assuming, under the Spending Clause the Federal
24 Government cannot do this, under the Constitution it
25 cannot do this; but, if it gets the State to agree to

1 it, well, then it can.

2 And the concern is, if you can say, if you
3 don't agree to this you lose all your money, whether
4 that's really saying the limitation in the Constitution
5 is -- is largely meaningless.

6 GENERAL VERRILLI: Well, but I don't think
7 that this is a case that presents that question,
8 Mr. Chief Justice.

9 CHIEF JUSTICE ROBERTS: No, no, I know. I'm
10 just -- I know this -- I don't know if I will grant it
11 to you or not, but let's assume it's not this case. Do
12 you recognize any limitation on that concern?

13 GENERAL VERRILLI: I think the Court has
14 said, in Steward Machine and Dole, that this is
15 something that needs to be considered in an appropriate
16 case, and we acknowledge that; but, I do think it's so
17 dependent on the circumstances that it's very hard to
18 say in the abstract with respect to a particular program
19 that there is a --

20 JUSTICE SCALIA: You can't imagine a case in
21 which it is both germane and yet coercive, is what you
22 are saying. There is no such case as far as you know.

23 GENERAL VERRILLI: Well, I am not prepared
24 to -- to say right here that I can -- that --

25 JUSTICE SCALIA: I wouldn't think that is a

1 surprise question. I mean, you know --

2 GENERAL VERRILLI: I mean, you know,
3 Congress has authority to act and --

4 JUSTICE SCALIA: Hey, I can't think of one.
5 I'm not blaming you for not thinking of one.

6 (Laughter.)

7 GENERAL VERRILLI: But I do think -- but I
8 do think -- I really do think that it's important to
9 look at this, an issue like this, if you are going to
10 consider it, it has got to be considered in the factual
11 context in which it arises.

12 JUSTICE ALITO: Well, let me give you a
13 factual context. Let's say Congress says this to the
14 States: We have got great news for you. We know that
15 your expenditures on education are a huge financial
16 burden, so we are going to take that completely off your
17 shoulders. We are going to impose a special Federal
18 education tax which will raise exactly the same amount
19 of money as all of the States now spend on education,
20 and then we are going to give you a grant that is equal
21 to what you spent on education last year.

22 Now, this is a great offer and we think you
23 will take it, but, of course, if you take it, it's going
24 to have some conditions because we're going to set rules
25 on teacher tenure, on collective bargaining, on

1 curriculum, on textbooks, class size, school calendar,
2 and many other things. So, take it or leave it.

3 If you take it, you have to follow our rules
4 on all of these things. If you leave it, well, then
5 you're going to have to fine -- you are going to have to
6 tax your citizens, they're going to have to pay the
7 Federal education tax; but on top of that, you're going
8 to have to tax them for all of the money that you're now
9 spending on education, plus all of the Federal funds
10 that you were previously given.

11 Would that be -- would that reach the
12 point -- would that be the point where financial
13 inducement turns into coercion?

14 GENERAL VERRILLI: No, I don't think so --

15 JUSTICE ALITO: No?

16 GENERAL VERRILLI: -- because they do, the
17 States do have a choice there, especially as a -- as a
18 going-in proposition. The argument the States are
19 making here is not that they're -- that -- this is not a
20 going-in proposition. Their argument is that they're --
21 they are in a position where they don't have a choice
22 because of everything that has happened before. But --

23 JUSTICE ALITO: You might be right. But if
24 that's the case, then there's nothing left --

25 GENERAL VERRILLI: Well, but as a --

1 JUSTICE ALITO: -- of federalism.

2 GENERAL VERRILLI: As a practical matter, I
3 disagree with that, Justice Alito. First of all, as a
4 practical matter, there's a pretty serious political
5 constraint on that situation ever arising, because it's
6 not like the Federal Government is going to have an easy
7 time of raising the kinds of tax revenues that need to
8 be -- needed to raised to work that kind of fundamental
9 transformation, and that's real. And political
10 constraints do operate to protect federalism in this
11 area.

12 JUSTICE SCALIA: I would have thought there
13 was a serious political strain -- constraint on the
14 individual mandate, too, but that didn't work. What you
15 call serious political constraints sometimes don't work.

16 GENERAL VERRILLI: But -- but with respect
17 to a situation like that one, Justice Scalia, the -- the
18 States have their education system, and they can decide
19 whether they're going to go in or not. But here, of
20 course, I think it's important to trace through the
21 history of Medicaid. It is not a case, as my friend
22 from the other side suggested, that the norm here is
23 that the Federal Government has offered to the States
24 the opportunity either to stay where they are or add the
25 new piece.

1 We can debate that proposition with respect
2 to 1972 one way or another. The States have one view
3 about that; we have a different one. But starting in
4 the 1984 expansion, with respect to pregnant women and
5 infants, it was an expansion of the entire program;
6 States were given the choice to stay in the entire
7 program or not. 1989 when the program was expanded to
8 children under 6 years of age, under 133 percent of
9 poverty, same thing. 1990, kids 6 to 18 and 100 percent
10 of poverty, same thing. In fact, every major expansion,
11 same thing.

12 And so, I just think the history of the
13 program, and particularly when you read that in context
14 of 42 U.S.C. 1304, which reserves the right of the
15 Federal Government to amend the program going forward,
16 shows you that this is something that the States have
17 understood all along. This has been the evolution of
18 it, and with respect to --

19 CHIEF JUSTICE ROBERTS: Could you give me
20 some assurance? We heard the question about whether or
21 not the Secretary would use this authority to the extent
22 available. Is there circumstances where you are willing
23 to say that that would not be permissible? I'm thinking
24 of the Arizona letter, for example. I mean, if I had
25 the authority and I was in that position, I would use it

1 all the time. You might -- you want some little change
2 made? Well, guess what; I can take away all your money
3 if you don't make it. I win. Every time.

4 It seems that that would be the case. So,
5 why shouldn't we be concerned about the extent of
6 authority that the government is exercising, simply
7 because they could do something less? We have to
8 analyze the case on the assumption that that power will
9 be exercised, don't we?

10 GENERAL VERRILLI: Well, Mr. Chief Justice,
11 it would not be responsible of me to stand here in
12 advance of any particular situation becoming -- coming
13 before the Secretary of Health and Human Services and
14 commit to how that would be resolved one way or another.
15 But that --

16 CHIEF JUSTICE ROBERTS: No, I appreciate
17 that. I appreciate that, but I guess --

18 GENERAL VERRILLI: That discretion is there
19 in the statute, and I think there's every reason to
20 think it's real, but I do think, getting back to the
21 circumstances here --

22 JUSTICE KAGAN: Well, General, what's the --
23 been the history of its use? Has the Secretary in fact
24 ever made use of that authority?

25 GENERAL VERRILLI: That's correct, Justice

1 Kagan. It's never been used --

2 CHIEF JUSTICE ROBERTS: What about the
3 Arizona letter we just heard about today?

4 GENERAL VERRILLI: It has never been used to
5 cut off --

6 CHIEF JUSTICE ROBERTS: It's been used to
7 threaten --

8 JUSTICE SCALIA: Of course not.

9 CHIEF JUSTICE ROBERTS: Of course no State
10 is going say, okay, go ahead, make my day, take it away.
11 They're -- they're going to give in.

12 GENERAL VERRILLI: If we could go to the
13 situation we have here, Mr. Chief Justice, this -- with
14 respect to the Medicaid expansion, the States' argument
15 is, as they've said in their briefs -- they articulated
16 a little bit different this morning -- this afternoon.
17 But as they said it in their briefs was it's not what
18 you stand to gain, but what you stand to lose.

19 But I think an important thing in evaluating
20 that argument in this context is fully 60 percent of
21 Medicaid expenditures in this country are based on
22 optional choices. And I don't mean by that the optional
23 choices of the States to stay in the program in '84 or
24 '88 or '89. But -- but States are given choices to
25 expand the beneficiaries beyond the Federal minimum and

1 to expand services beyond the Federal minimum.

2 JUSTICE KENNEDY: And just a small point,
3 and please correct me if I am wrong. It -- does this
4 Act not require States to keep at the present level
5 their existing Medicaid expenditure? So some States may
6 have been more generous than others in Medicaid, but
7 this Act freezes that so the States can't go back. Or
8 am I incorrect?

9 GENERAL VERRILLI: It's much more nuanced
10 than that, Justice Kennedy. There is something called a
11 maintenance of effort provision which lasts until 2014,
12 until such time as the Medicaid expansion takes place
13 and the exchanges are in place. That applies to the
14 population. It says, with respect to the population,
15 you can't take anybody out. It does not apply to the
16 optional benefits where the States still have
17 flexibility. They can still reduce optional benefits
18 that they're now providing if they -- if they want to
19 control costs. They can also work on provider rates.
20 There's also -- with respect to demonstration projects
21 by which some States have expanded their populations
22 beyond the required eligibility levels, they don't have
23 to keep them in. And then there's also, if the State
24 has a budgetary crisis, it can get a waiver of that, as
25 Wisconsin did. So, that is a -- that's a provision I

1 think that does a significant degree less than my
2 friends on the other side have suggested in terms of --
3 in terms of its effect, and its effect beyond that is
4 just temporary.

5 But I do think with respect to the -- the
6 first of their three arguments for coercion, the sheer
7 size argument, that it's very difficult to see how that
8 is going to work, because if the question is about what
9 you stand to lose rather than what you stand to gain,
10 then it seems to me that it doesn't matter whether the
11 Medicaid expansion is substantial or whether it's
12 modest, or whether there's any expansion at all. The
13 States, for example -- the Federal Government, for
14 example, could decide that under -- under the current
15 system too much money has ended up flowing to nursing
16 home care and that money would be better serving the
17 general welfare if it were directed at infants and
18 children. But if the Federal Government said we're
19 going to redirect the spending priorities of the Federal
20 money that we're offering to you, the States could say,
21 well, geez, we don't like that; we'd like to keep
22 spending the money the way we were, and we have no
23 choice, because this has gotten too big for us to exit.
24 And so -- and in fact, it seems to me, standing here
25 today before these expansions take place, under their

1 theory, the provision is coercive.

2 JUSTICE SCALIA: The smaller it, is the
3 bigger the coercion.

4 GENERAL VERRILLI: Well --

5 JUSTICE SCALIA: The smaller what you're
6 demanding of them, the bigger the coercion to go along.

7 GENERAL VERRILLI: The more they stand to
8 lose. And -- and so -- and then it -- I'm sorry,
9 Justice Breyer.

10 JUSTICE BREYER: I -- just before you leave
11 that, I'd -- I'd appreciate it if you would expand a
12 little bit on the answer to Justice Kagan's question for
13 the reason, when I read the cutoff statute, which as I
14 said has been there since 1965 unchanged, it does refer
15 to the Secretary's discretion to keep the funding,
16 insofar as the funding has no relationship to the
17 failure to comply with the condition.

18 And as I read that, that gives the Secretary
19 the authority to cut off all the money, but the States'
20 refusal to accept the condition means they shouldn't
21 have. But nothing there says they can go beyond that
22 and cut off unrelated money. Now, there is a sentence
23 says maybe they could do that. I thought they had to
24 exercise that within reason.

25 GENERAL VERRILLI: Right. Well --

1 JUSTICE BREYER: I don't know when it be
2 reasonable. So, you've looked into it, and that's what
3 I want to know.

4 GENERAL VERRILLI: Right.

5 JUSTICE BREYER: Is there -- I could find no
6 instance where they went beyond the funds that were
7 related to the thing that the State refused to do or
8 things affected by that. I would like you to tell me,
9 when you looked into it, that what I thought of in this
10 isolation chamber here is actually true. Or whether
11 they have gone around threatening people that we will
12 cut off totally unrelated funds.

13 What is the situation?

14 GENERAL VERRILLI: I think the situation is
15 generally as you've described it, but I do want to be
16 careful in saying I don't think it would be responsible
17 of me to commit now that the Secretary would exercise
18 the discretion uniformly in one way or another.

19 CHIEF JUSTICE ROBERTS: Well, but that's
20 just saying that when, you know, the analogy that has
21 been used, the gun to your head, "your money or your
22 life," you say, well, there's no evidence that anyone
23 has ever been shot.

24 GENERAL VERRILLI: But --

25 CHIEF JUSTICE ROBERTS: Well, it's because

1 you have to give up your wallet. You don't have a
2 choice.

3 GENERAL VERRILLI: But that --

4 CHIEF JUSTICE ROBERTS: And you cannot --
5 you cannot represent that the Secretary has never said:
6 And if you don't do it, we are going to take away all
7 the funds.

8 They cite the Arizona example; I suspect
9 there are others, because that is the leverage.

10 GENERAL VERRILLI: But it --

11 CHIEF JUSTICE ROBERTS: I'm not saying
12 there's anything wrong with it.

13 GENERAL VERRILLI: It's not coercion, Mr.
14 Chief Justice.

15 CHIEF JUSTICE ROBERTS: Wait a second. It's
16 not -- it's not coercion -- well, I guess that's what
17 the case is. It's not coercion --

18 GENERAL VERRILLI: It's not coercion.

19 CHIEF JUSTICE ROBERTS: -- to say I'm going
20 to take away all your funds, no matter how minor the
21 infringement?

22 GENERAL VERRILLI: But, of course --

23 JUSTICE BREYER: I don't know if that's so.
24 And all I asked in my question was I didn't ask you to
25 commit the Secretary to anything. I wanted to know what

1 the facts are.

2 GENERAL VERRILLI: I --

3 JUSTICE BREYER: I wanted to know what you
4 found in researching this case. I wanted you, in other
5 words, to answer the question the Chief Justice has: Is
6 it a common thing, that that happens, that this
7 unrelated threat is made? Or isn't it?

8 GENERAL VERRILLI: It's -- my understanding
9 is that these situations are usually worked out back and
10 forth between the States and the Federal Government.
11 And I think that most --

12 JUSTICE BREYER: And you are not privy to
13 what those are.

14 GENERAL VERRILLI: And I'm not. But --

15 JUSTICE SCALIA: And who wins?

16 GENERAL VERRILLI: Well, I think -- that's
17 what I think is the problem here, Justice Scalia, is it
18 seems to me we are operating under a conception that
19 isn't right.

20 The reason we have had all these Medicaid
21 expansions, and the reason, it seems to me, why we are
22 where we are now, and why 60 percent of what's
23 being spent on Medicaid is based on voluntary decisions
24 by the States to expand beyond what Federal law
25 requires, is because this is a good program and it

1 works. And the States generally like what it
2 accomplishes --

3 JUSTICE KAGAN: And, General Verrilli --

4 JUSTICE ALITO: General Verrilli, is this
5 discussion realistic? The objective of the Affordable
6 Care Act is to provide near universal health care.

7 Now, suppose that all of the 26 States that
8 are parties to this case were to say, well, we're not
9 going to -- we're not going to abide by the new
10 conditions. Then, there would be a huge portion -- a
11 big portion of the population that would not have
12 healthcare.

13 And it's a realistic possibility the
14 Secretary is going to say, well, okay, fine, you know.
15 We are going to cut off your new funds, but we are not
16 going to cut off your old funds, and just let that
17 condition sit there?

18 GENERAL VERRILLI: Well, just as I can't
19 make a commitment that the authority wouldn't be
20 exercised, I'm not going to make a commitment that it
21 would be exercised. But I do think that that -- to try
22 and move away from the first of their arguments, the
23 sheer size argument, to the second one, which is that
24 it's coercive by virtue of its relationship to the
25 Affordable Care Act, I really think that that's a

1 misconception, and I would like to be able to take a
2 minute and walk through and explain why that is.

3 JUSTICE KAGAN: General Verrilli, before you
4 do that, I'm sorry, but in response to the
5 Chief Justice's question, I mean, the money or your
6 life, has consequence because we are worried that that
7 person is actually going to shoot. So I think that this
8 question about are we -- what do we think the Secretary
9 is going to do is an important one.

10 And as I understand it, I mean, when the
11 Secretary withdraws funds, what the Secretary is doing
12 is withdrawing funds from poor people's health care, and
13 that the Secretary is reluctant and loathed to take
14 money away from poor people's health care. And that
15 that's why these things are always worked out. It's
16 that the Secretary really doesn't want to use this
17 power, and so the Secretary sits down with the State and
18 figures out a way for the Secretary not to use the
19 power.

20 GENERAL VERRILLI: That's correct,
21 Justice Kagan. That is no --

22 CHIEF JUSTICE ROBERTS: No, what the --

23 GENERAL VERRILLI: I'm sorry --

24 CHIEF JUSTICE ROBERTS: Go ahead.

25 GENERAL VERRILLI: That's another way of

1 trying to say what I was trying to say to Justice Scalia
2 earlier, is that the States and the Federal Government
3 share a common objective here, which is to get health
4 care to the needy. And, in the vast majority of
5 instances, they work together to make that happen.

6 CHIEF JUSTICE ROBERTS: But the question is
7 not -- obviously, the States are interested in the same
8 objective, and they have a disagreement, or they have
9 budget realities that they have to deal with. And
10 States say, well, we are going to cut by 10 percent what
11 we reimburse this for or that for, and the Federal
12 Government says, well, you can't.

13 And no one is suggesting that people want to
14 cut health care, but they have different views about how
15 to implement policy in this area.

16 And the concern is that the Secretary has
17 the total and complete say because the Secretary has the
18 authority under this provision to say, you lose
19 everything. No one's suggested in the normal course
20 that will happen; but, so long as the Federal government
21 has that power, it seems to be a significant intrusion
22 on the sovereign interests of the State.

23 Now, I'm not -- it may be something they
24 gave up many decades ago when they decided to live off
25 of Federal funds, but I don't think you can deny that

1 it's a significant authority that we are giving the
2 Federal Government to say, you can take away everything
3 if the States don't buy into the next program.

4 GENERAL VERRILLI: Well, but what I would
5 say about that, Mr. Chief Justice, is that we recognize
6 that these decisions aren't going to be easy decisions
7 in some circumstances. As a practical matter, there may
8 be circumstances in which they are very difficult
9 decisions. But that's different from saying that they
10 are coercive, and that's different from saying that it's
11 an unconstitutional --

12 JUSTICE BREYER: Why is it different? Why
13 is it different? I mean, I thought it might be very
14 unlikely that a State would ever say -- the government
15 -- Federal Government would say, here's a condition that
16 you have to have a certain kind of eyeglasses for people
17 who don't see. And, by the way, if you don't do that,
18 we'll take away \$42 billion of funding, okay?

19 I thought such a thing would not happen.
20 And I thought if it tried to happen, that it's governed
21 by the APA, and the person with the eyeglasses would say
22 it's arbitrary, capricious abuse of discretion. And
23 that's so, even though the statute says it's in the
24 discretion of the Secretary.

25 But Mr. -- your colleague and brother says

1 no, I'm wrong about the law there, and, moreover, they
2 would do it. That's what I'm hearing now, that they
3 would do it, and they do do it, and -- and, etc. So I
4 would like a little clarification.

5 GENERAL VERRILLI: In the situation
6 described in your hypothetical, Justice Breyer, I think
7 it's -- the Secretary of Health and Human Services would
8 never do it.

9 But what I'm saying is, with respect to the
10 Medicaid expansion in this case --

11 JUSTICE SCALIA: Could never do it or would
12 --

13 GENERAL VERRILLI: Would never do it.

14 JUSTICE SCALIA: It's your prediction, okay.

15 GENERAL VERRILLI: Well, and I think that it
16 would have to satisfy the administrative procedure. I
17 think that's a real constraint. What I'm not -- what I
18 don't feel able to do here is to say with respect to
19 this Medicaid expansion --

20 JUSTICE SCALIA: Are you willing to
21 acknowledge that the Administrative Procedure Act is a
22 limitation on the Secretary's ability to cut off all the
23 funds; she can't do it if it -- if that would be
24 unreasonable? Are you willing to accept that? I
25 wouldn't if I were you.

1 GENERAL VERRILLI: So --

2 (Laughter.)

3 GENERAL VERRILLI: What I'm trying to do
4 here is to -- is to suggest that the Secretary does have
5 discretion under the statute, and that that -- and that
6 --

7 JUSTICE SCALIA: Indeed, part of the
8 discretion is to cut off all of the funds. That's what
9 the statute says.

10 GENERAL VERRILLI: And it is possible, and
11 I'm not willing to give that away. But that doesn't
12 make this --

13 JUSTICE KAGAN: But, General Verrilli,
14 you're not willing to give away whether the APA would
15 bar that, but the APA surely has to apply to a
16 discretionary act of the Secretary.

17 GENERAL VERRILLI: I agree with that,
18 Justice Kagan, but --

19 JUSTICE BREYER: What's making you
20 reluctant?

21 GENERAL VERRILLI: I'm not trying to be --
22 I'm not trying to be reluctant. I understand how this
23 works. I'm trying to be careful about the authority of
24 the Secretary of Health and Human Services and how it
25 will apply in the future.

1 JUSTICE SCALIA: I wouldn't worry a lot if I
2 were you. I don't know of any case that, where the
3 Secretary's discretion explicitly includes a certain
4 act, we have held that, nevertheless, that act cannot be
5 performed unless we think it reasonable. I don't know
6 any case like that.

7 Yes, when there's just a general grant of
8 discretion, it has to be exercised reasonably. But
9 maybe Justice Breyer knows such a case.

10 JUSTICE BREYER: Yes, I do.

11 JUSTICE SCALIA: All right. Give it to me.

12 (Laughter.)

13 GENERAL VERRILLI: If I could go back to the
14 sheer size idea, there's, I think, another couple of
15 points that are important in thinking about whether
16 that's a principle courts could ever apply.

17 Once you get into that business -- in
18 addition to the problem I identified earlier, that it
19 basically means that Congress is frozen in place -- now,
20 based on the size of the program, you've got this
21 additional issue of having to make a judgment about in
22 what circumstances will -- will the loss of the Federal
23 funding be so significant that you would count it
24 as being coercive.

25 JUSTICE KENNEDY: I suppose one test could

1 be -- I just don't see that it would be very workable --
2 is whether or not it's so big that accountability is
3 lost, that it is not clear to the citizens that the
4 State or the Federal Government is administering the
5 program, even though it's a State administrator.

6 GENERAL VERRILLI: Well, but I think this
7 going to come from a --

8 JUSTICE KENNEDY: And I think that's
9 unworkable.

10 GENERAL VERRILLI: This is going to come
11 from a withdrawal situation. Their argument's about
12 it's what you stand to lose and with respect to
13 withdrawal.

14 I mean -- so, does it depend on -- is it an
15 absolute or a relative number with respect to how much
16 of the State budget? Is it a situation where you have
17 to make a calculation about how hard would it be for
18 that State to make up in State tax revenues the Federal
19 revenue they would lose? Does that depend on whether
20 it's a high tax State or a low tax State? It just seems
21 to me -- and then, what is the political climate in that
22 State? It seems to me like --

23 JUSTICE KENNEDY: In your view -- in your
24 view, does federalism require that there be a relatively
25 clear line of accountability for political acts?

1 GENERAL VERRILLI: Yes, of course, it does,
2 Justice Kennedy. But, here --

3 JUSTICE KENNEDY: Is that subsumed in the
4 coercion test, or is that an independent one?

5 GENERAL VERRILLI: You know, here, the
6 coercion test, as it's been discussed, I think, for
7 example, in Justice O'Connor's dissent in Dole and in
8 some of the other literature, does address federalism
9 concerns in the sense of the Federal Government using
10 Federal funding in one area to try to get states to act
11 in an area where the Federal Government may not have
12 Article I authority.

13 JUSTICE KENNEDY: Yes.

14 GENERAL VERRILLI: But, as Your Honor
15 suggested earlier, this is a situation in which, while
16 it is certainly true that the Federal Government
17 couldn't require the States, as the Chief Justice
18 indicated, to carry out this program, the Federal
19 Government could, as Your Honor suggested, expand
20 Medicare and do it itself.

21 JUSTICE KENNEDY: But do you agree that
22 there still is inherent and implicit in the idea of
23 federalism, necessary for the idea of federalism, that
24 there be a clear line of accountability so the citizen
25 knows that it's the Federal or the State government who

1 should be held responsible for their program?

2 GENERAL VERRILLI: Certainly, but I
3 think the problem here is --

4 JUSTICE KENNEDY: And does coercion relate
5 to that, or is that a separate --

6 GENERAL VERRILLI: Yes, but I think --

7 JUSTICE KENNEDY: -- is that a separate
8 doctrine?

9 GENERAL VERRILLI: Well, I think it relates
10 to it in the opposite way that my friends on the other
11 side would like it to, in that I think their argument is
12 that it would subject us to such a high degree of
13 political accountability at the State level to withdraw
14 ourselves from the program, that it's an unpalatable
15 choice for us, and that's where the coercive effect
16 comes from. And that's why I think --

17 JUSTICE KENNEDY: Well, but I think the
18 answer would be that the State wants to preserve its
19 integrity, its identity, its responsibility in the
20 Federal system.

21 GENERAL VERRILLI: And it may -- and, of
22 course, it may do so, and it can make --

23 JUSTICE SCALIA: May it do so?

24 Doesn't the question come down to this --
25 maybe you can answer this yes. But -- but isn't the

1 question simply: Is it conceivable to you, as it was
2 evidently not to Congress, that any State would turn
3 down this offer, that they can't refuse? Is it
4 conceivable to you that any State would have said no to
5 this program? Congress didn't think that, because some
6 of its other provisions are based on the assumption that
7 every single State will be in this thing.

8 GENERAL VERRILLI: I think --

9 JUSTICE SCALIA: Now, do you -- can you
10 conceive of a State saying no? And -- and if you can't,
11 that sounds like coercion to me.

12 GENERAL VERRILLI: I think -- I think
13 Congress predicted that States would stay in this
14 program, but the -- prediction is not coercion. And the
15 reason Congress predicted it, I think, Justice Scalia,
16 is because the Federal government is paying 90-plus
17 percent of the costs. It increases State costs --

18 JUSTICE SCALIA: So what do you predict? If
19 you predict the same, that 100 percent of the States
20 will accept it, that sounds like coercion.

21 GENERAL VERRILLI: Prediction is not
22 coercion. I disagree, Justice Scalia. That's just an
23 assumption, and if it proves to be wrong, then Congress
24 has time to recalibrate. And beyond that, I do think if
25 -- I just want to go back to the -- the other part of

1 Your Honor's point -- that with respect to the
2 relationship between Medicaid and the -- the Act, and
3 particularly the minimum coverage provision, my -- my
4 friend Mr. Clement has suggested that you can infer
5 coercion because, with respect to the population to
6 which the provision applies, if there's no Medicaid,
7 there's no other way for them to satisfy the
8 requirement.

9 I want to work through that for a minute if
10 I may, because it's just incorrect.

11 First of all, with respect to anybody at
12 100 percent of the poverty line or above, there is an
13 alternative in the statute. It's the exchanges with tax
14 credits and with subsidies to insurance companies. So
15 with respect to that, the part of the population at
16 100 percent of poverty to 133 percent of poverty, the --
17 the statute actually has an alternative for them.

18 For people below 100 percent of poverty, it
19 -- it is true that there is no insurance alternative.
20 But by the same token, there is no penalty that is going
21 to be imposed on anybody in that group.

22 To begin with, right now, the -- the level
23 of 100 percent of poverty is \$10,800. The -- the
24 requirement for filing a Federal income tax return is
25 \$9,500. So anybody below \$9,500, no penalty, because

1 they don't have to file an income tax return. The
2 sliver of people between \$9,500 and \$10,800, the
3 question there is are they going to be able to find
4 health insurance that will cost them less than 8 percent
5 of their income.

6 JUSTICE ALITO: Well, I'm not -- in selling
7 this argument -- take the poorest of the poor. If there
8 is no Medicaid program, then they're not going to get
9 health care. Isn't that right?

10 GENERAL VERRILLI: Yes, that's true. But
11 this --

12 JUSTICE ALITO: So Congress obviously
13 assumed -- it thought it was inconceivable that any
14 State would reject this offer, because the objective of
15 the Affordable Care Act is to provide near-universal
16 care. And Medicaid is the way to provide care for at
17 least the poorest of the poor. So it -- it just didn't
18 occur to them that this was a possibility.

19 GENERAL VERRILLI: Well --

20 JUSTICE ALITO: And when -- when that's the
21 case, how can that not be coercion?

22 GENERAL VERRILLI: Well --

23 JUSTICE ALITO: Unless it's just a gift.
24 Unless it's just purely a gift.

25 Then it comes back to the question of

1 whether you think it makes a difference that the
2 money -- a lot of the money to pay for this -- is going
3 to come out of the same taxpayers that the States have
4 to tax to get their money.

5 GENERAL VERRILLI: This is -- this is a --
6 this is -- these are Federal dollars that Congress has
7 offered to the States and said, we're going to make this
8 offer to you, but here's how these dollars need to be
9 spent. This is the essence of Congress's Article I
10 authority under the General Welfare Clause and the
11 Appropriations Clause. This is not some remote
12 contingency, or an effort to leverage in that regard.
13 This is how Congress is going to have the Federal
14 government's money be used if States choose to accept
15 it.

16 Yes, it was reasonable for Congress to
17 predict in this circumstance that the States were going
18 to -- to take this money, because -- because it is an
19 extremely generous offer of funds: 90-plus percent of
20 the funding. States can -- can expand their Medicaid
21 coverage to more than 20 percent of their population for
22 an increase of only 1 percent --

23 CHIEF JUSTICE ROBERTS: If it's such a good
24 deal --

25 GENERAL VERRILLI: -- of their funding.

1 CHIEF JUSTICE ROBERTS: -- why do you care?
2 If it's such a good deal, why do you need the club?

3 GENERAL VERRILLI: Well, the -- the --

4 CHIEF JUSTICE ROBERTS: If it's a good deal,
5 take it. We're not going to -- if you don't take it,
6 you're just hurting yourself. We're not going to --

7 GENERAL VERRILLI: That's -- that's a
8 judgment for Congress to make about how the Federal --
9 how Federal funds are going to be used if States choose
10 to accept them, and Congress has made that judgment.
11 That's Congress's judgment to make, and it's -- it
12 doesn't mean that it's coercive.

13 CHIEF JUSTICE ROBERTS: You have another
14 15 minutes.

15 GENERAL VERRILLI: Lucky me. Lucky me.
16 (Laughter.)

17 JUSTICE KENNEDY: But the -- but the point
18 is -- but the -- the point is, there's -- there's no
19 real --

20 JUSTICE SOTOMAYOR: Can we go back --

21 JUSTICE KENNEDY: There's no real -- there's
22 no realistic choice. There's no real choice. And
23 Congress does not in effect allow for an out -- opt out.
24 We just know that.

25 And it's --

1 GENERAL VERRILLI: Well, I guess I --

2 JUSTICE KENNEDY: -- it's substantial.

3 GENERAL VERRILLI: I would go back, Justice
4 Kennedy, to the --

5 JUSTICE KENNEDY: I recognize the problem
6 with that test.

7 GENERAL VERRILLI: I would go back to the
8 fact that 60 percent of the Medicaid spending is now
9 optional. It's -- it's a result of choices that States
10 have made that -- it's expanded the --

11 JUSTICE KENNEDY: Even though they're now
12 frozen in, per our earlier discussions, to a large
13 extent.

14 GENERAL VERRILLI: Well, but -- well, no --
15 to a more -- much more modest extent was my point,
16 Justice Kennedy. For example, optional services where a
17 huge amount of money is spent -- more than \$100 billion
18 annually -- the largest component of that is nursing
19 home services. That remains optional. It's -- right
20 now, once the minimum -- once the maintenance provision
21 remains in place, States have the flexibility to that --
22 reduce those numbers.

23 States have considerable flexibility now and
24 going forward with respect to the way that money is
25 spent. And I do think in terms of evaluating whether

1 this expansion should be considered coercive, it has got
2 to be evaluated against the backdrop of the fact that
3 the States are generally taking -- are generally taking
4 advantage of the opportunities of this statute to
5 greatly expand the amount of money that the Federal
6 government spends and the amount of money that they
7 spend to try to make the -- the lives of their citizens
8 better. I think --

9 JUSTICE KENNEDY: Of course, they have to do
10 so by hiring a very substantial number of more
11 employees. There will be State employees. There'll be
12 substantial State administrative expenses that are not
13 reimbursed.

14 GENERAL VERRILLI: Well, but -- I would take
15 issue with that, Justice Kennedy. Part of the
16 Affordable Care Act is that it -- it provides for new
17 streamlined eligibility processes to get people into the
18 system at a -- at a much faster and cheaper rate. There
19 are going to be costs to set that up. But under the
20 statute, the Federal government is going to pay
21 90 percent of those costs, the short-term set-up costs.

22 And then all of the projections that we have
23 seen suggest that the medium- to long-term costs once
24 these changes are in place are going to be dramatically
25 lower for the states --

1 CHIEF JUSTICE ROBERTS: Well, what --

2 GENERAL VERRILLI: -- on the administrative
3 side.

4 CHIEF JUSTICE ROBERTS: Obviously, the
5 Federal government isn't bound to that. And what if,
6 after the 90 percent, they say well, now -- from now on,
7 we're going to pay 70 percent? What happens then?
8 Where does that extra money come from?

9 GENERAL VERRILLI: Well, I think -- then --
10 then the States would have a choice at that -- at that
11 point whether they were going to stay in the program or
12 not. But that isn't what we have here, and --

13 CHIEF JUSTICE ROBERTS: There's no -- they
14 can just bail out -- whenever the government reduces the
15 amount of the percentage that it's going to pay, the
16 States can say, that's -- that's --

17 GENERAL VERRILLI: Well, I'm not saying it
18 would be an easy choice, Mr. Chief Justice --

19 JUSTICE SCALIA: They'd have to bail out of
20 Medicaid, you're talking about, not just there.

21 GENERAL VERRILLI: Right. That that would
22 be --

23 JUSTICE SCALIA: Oh.

24 GENERAL VERRILLI: Right. That that would
25 be the option. They can leave Medicaid if they decide

1 that that isn't working for them. I'm not saying this
2 is an easy choice. I'm also not saying it would happen,
3 because the Secretary does have this discretion --

4 CHIEF JUSTICE ROBERTS: Well, the Secretary
5 has the discretion. We're talking about something else.
6 We're talking about fiscal realities, and whether or not
7 the Federal government is going to say we need to lower
8 our contribution to Medicaid and leave it up to the
9 States because we want the people to be mad at the
10 States when they have to have all these budget cuts to
11 keep it up, and not at the Federal government.

12 GENERAL VERRILLI: But that would be true,
13 Mr. Chief Justice, whether this Medicaid expansion
14 occurred or not and --

15 CHIEF JUSTICE ROBERTS: I know, but you've
16 been emphasizing that the Federal government is going to
17 pay 90 percent of this, 90 percent of this, and it's --
18 it's not something they can take to the bank, because
19 the next day or the next fiscal year, they can decide,
20 we're going to pay a lot less. And you, States, are
21 still on the hook, because you -- you don't -- you say
22 it's not an easy choice. We can say -- ask whether it's
23 coercion. You're not going to be able to bail out of
24 Medicaid. You just have to pay more because we're going
25 to pay less.

1 GENERAL VERRILLI: Well, like I said, I -- I
2 agree that it would be a difficult choice in some
3 circumstances. But that is not to say it's coercion as
4 a legal matter or even as a practical matter. And I
5 think it would depend on what the circumstances were on
6 how -- and I -- I think, trying to think about how a
7 court would ever answer the question of whether it was
8 coercive, it was too difficult as a practical matter for
9 States --

10 JUSTICE SOTOMAYOR: General, I'm trying
11 to --

12 GENERAL VERRILLI: -- to withdraw.

13 JUSTICE SOTOMAYOR: -- go back to that
14 because Justice Kennedy asked you whether there is -- I
15 think he said it's -- it's coercion if no one can be
16 politically accountable. I'm not sure how that could be
17 practically politically accountable because almost every
18 gift -- if the terms are attractive, it would be an un
19 -- unattractive political alternative to turn it down.

20 Dole itself was one of those cases. I think
21 every State raised the drinking age to 21; correct?

22 GENERAL VERRILLI: Yes, Justice Sotomayor,
23 and this argument was raised in Dole, and the Court
24 rejected it as a --

25 JUSTICE SOTOMAYOR: I guess my point is that

1 political accountability has two components: What can I
2 do if I like something, and what can I do if I don't
3 like something? And if people really like something
4 like Medicaid, they're not going to let you drop it,
5 correct.

6 GENERAL VERRILLI: Well, the citizens of the
7 State, but that's the citizen of the State acting --

8 JUSTICE SOTOMAYOR: Exactly. That's the
9 whole point; that's their choice, right?

10 GENERAL VERRILLI: -- in the capacity of the
11 citizens of the State. And I think that's why I get --
12 try to get back to the point, that's why I think this is
13 wrong to think about this as coercion, because this is a
14 program that works effectively for the citizens of the
15 State, and States' governments -- and State governments
16 think that, and that's why it has expanded the way it
17 has expanded, because it's providing an essential
18 service for millions of needy citizens in these States.
19 It's providing access to health care that they would not
20 otherwise have.

21 CHIEF JUSTICE ROBERTS: You mentioned the --
22 the Dole case. Now, what was the threat in that case,
23 raise your drinking age to 21 or what?

24 GENERAL VERRILLI: Or lose a percentage of
25 your highway funds.

1 CHIEF JUSTICE ROBERTS: Do you remember the
2 percentage?

3 GENERAL VERRILLI: Seven percent, yes.

4 CHIEF JUSTICE ROBERTS: Yes. It's a pretty
5 small amount. That's really apples and oranges when
6 you're talking about lose all of your Medicaid funds or
7 lose -- I thought it was 5, but 7 -- 7 percent of your
8 highway funds.

9 GENERAL VERRILLI: It's -- I think I agree
10 with Your Honor, that it -- that it's different, but I
11 don't think that that makes coercion as a legal matter.
12 As I said, I think that this is a situation in which
13 the -- if the States -- is it -- I'm not saying it would
14 be an easy choice, but the States made the choice,
15 they've made the choice. And --

16 JUSTICE SOTOMAYOR: Well, they made a choice
17 with the stimulus bill, didn't they? Some governors
18 rejected the stimulus bill --

19 GENERAL VERRILLI: That's -- that's correct,
20 Justice Sotomayor. And --

21 JUSTICE SOTOMAYOR: -- and some of -- some
22 of their congressional or legislative processes
23 overturned that.

24 GENERAL VERRILLI: That's right.

25 JUSTICE SOTOMAYOR: In others, they

1 supported it. The percentages were smaller, but it's
2 always the preference of the voters as to what they
3 want, isn't it?

4 GENERAL VERRILLI: That is correct.

5 CHIEF JUSTICE ROBERTS: What was the threat
6 in the stimulus bill? What would the State lose?

7 GENERAL VERRILLI: That answer I don't know,
8 Mr. Chief Justice.

9 CHIEF JUSTICE ROBERTS: Would anything be
10 taken away, or would it just lose the opportunity to get
11 the money?

12 GENERAL VERRILLI: I don't know the answer
13 to that. I don't know the answer to that.

14 But if I may just say in conclusion that --
15 I'd like to take half a step back here, that this
16 provision, the Medicaid expansion that we're talking
17 about this afternoon and the provisions we talked about
18 yesterday, we've been talking about them in terms of
19 their effect as measures that solve problems, problems
20 in the economic marketplace, that have resulted in
21 millions of people not having health care because they
22 can't afford insurance.

23 There is an important connection, a profound
24 connection, between that problem and liberty. And I do
25 think it's important that we not lose sight of that.

1 That in this population of Medicaid eligible people who
2 will receive health care that they cannot now afford
3 under this Medicaid expansion, there will be millions of
4 people with chronic conditions like diabetes and heart
5 disease, and as a result of the health care that they
6 will get, they will be unshackled from the disabilities
7 that those diseases put on them and have the opportunity
8 to enjoy the blessings of liberty.

9 And the same thing will be true for -- for a
10 husband whose wife is diagnosed with breast cancer and
11 who won't face the prospect of being forced into
12 bankruptcy to try to get care for his wife and face the
13 risk of having to raise his children alone. And I could
14 multiply example after example after example.

15 In a very fundamental way, this Medicaid
16 expansion, as well as the provisions we discussed
17 yesterday, secure of the blessings of liberty. And I
18 think that that is important as the Court is considering
19 these issues that that be kept in mind. The -- the
20 Congress struggled with the issue of how to deal with
21 this profound problem of 40 million people without
22 health care for many years, and it made a judgment, and
23 its judgment is one that is, I think, in conformity with
24 lots of experts thought, was the best complex of options
25 to handle this problem.

1 Maybe they were right; maybe they weren't.
2 But this is something about which the people of the
3 United States can deliberate and they can vote, and if
4 they think it needs to be changed, they can change it.
5 And I would suggest to the Court, with profound respect
6 for the Court's obligation to ensure that the Federal
7 Government remains a government of enumerated powers,
8 that this is not a case in any of its aspects that calls
9 that into question. That this was a judgment of policy,
10 that democratically accountable branches of this
11 government made by their best lights.

12 And I would urge this Court to respect that
13 judgment and ask that the Affordable Care Act, in its
14 entirety, be upheld. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you, General.

16 Mr. Clement, you have 5 minutes.

17 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

18 ON BEHALF OF THE PETITIONERS

19 MR. CLEMENT: Thank you, Mr. Chief Justice
20 and may it please the Court:

21 Just a few points in rebuttal. First of all
22 we talked a lot about the sort of hallmark of coercion,
23 your money or your life, with somebody with a gun. I
24 would respectfully suggest that it is equally coercive
25 or certainly not uncoercive if I say your money or your

1 life -- and by the way, I have discretion as to whether
2 or not I will shoot the gun. I don't think that
3 eliminates the coercion.

4 I also don't think this is a discretion that
5 the Secretary would ever be able to exercise. And the
6 reason is, we disagree on the details, but the Solicitor
7 General and I agree that, over the years, Congress has
8 had different approaches to expanding Medicare.

9 Sometimes, as in 1972, it makes the
10 expansion voluntary; that's also by the way what
11 happened with the stimulus funds, which were voluntary
12 funds. You didn't lose all your Medicaid funds, which
13 is why 17 States could say no.

14 Sometimes, they take the voluntary approach.
15 Sometimes, as in 1984, they take the mandatory approach.
16 If the Secretary exercised the discretion to say, you
17 know what, it really isn't reasonable for you to have to
18 give up your funding for the visually impaired and the
19 disabled, just to cover these newly eligible people, so
20 we will make it voluntary; we'll make that
21 discretionary -- that would essentially be creating --
22 converting a 1984 amendment approach to a 1972 amendment
23 approach, and I just don't think that is the kind of
24 discretion that the Secretary has, with all due respect.

25 Now, moving on to the next point,

1 Justice Alito, your hypothetical, I think, aptly
2 captures the effect on this, based on the fact that
3 these tax dollars are being taken from the State's tax
4 base, and it's not like Steward Machine, where the
5 Federal Government would say, and oh, by the way, if you
6 don't take the option we are giving you, we are going to
7 have a Federal substitute that will go in, and we will
8 take care of the unemployed in your States.

9 Here, if you don't take this offer we are
10 giving you, your tax dollars will fund the other 49
11 States, and you will get nothing.

12 But of course, this situation is much more
13 coercive, even in your hypothetical, because it is tied
14 directly to the mandate. It's also tied to the -- to
15 participation in the preexisting program. So it is as
16 if there was yet another program for post-secondary
17 education; they gave them exactly your option --
18 option -- and then they also said, oh, and by the way;
19 you not only -- not get these funds, but you lose the
20 post-secondary fund as well.

21 It's really hard to understand tying the
22 preexisting participation in the program as anything
23 other than coercive. The Solicitor General makes a lot
24 of the fact that there are optional benefits under this
25 program.

1 Well, guess what? After the Medicaid
2 expansion there will be a lot less opportunity for the
3 States to exercise those options, because one of the
4 things that the expansion does -- precisely because the
5 expansion is designed to convert Medicaid into a program
6 that satisfies the requirement of the minimum essential
7 coverage of the individual mandate, things that used to
8 be voluntary will no longer be voluntary.

9 The perfect example is prescription
10 coverage. It's a big part of the benefits that some
11 States but not all provide voluntarily now. It will no
12 longer be voluntary after the expansion because the
13 Federal Government has deemed that prescription drugs to
14 be part of the minimal essential health coverage that
15 everybody in this country must have under the mandate.
16 So that option that the State has is being removed by
17 the expansion itself.

18 The Chief Justice made the point --

19 JUSTICE GINSBURG: Mr. Clement, may I ask
20 one question about the bottom line in this case? It
21 sounds to me like everything you said would be to the
22 effect of, if Congress continued to do things on a
23 voluntary basis, so we are getting these new eligibles,
24 and say, States, you can have it or not, you can
25 preserve the program as it existed before, you can opt

1 into this.

2 But you are not asking the Court as relief
3 to say, well, that's how we -- we -- that's how we cure
4 the constitutional infirmity; we say this has to be on a
5 voluntary basis. Instead, you are arguing that this
6 whole Medicaid addition, that the whole expansion has to
7 be nullified; and moreover, the entire health care act.
8 Instead of having the easy repair, you say that if we
9 accept your position, everything falls.

10 MR. CLEMENT: Well, Justice Ginsburg, if we
11 can start with the common ground that there is a need
12 for repair because there is a coercion doctrine and this
13 statute is coercion, then we are into the question of
14 remedy. And we do think, we do take the position that
15 you describe in the remedy, but we would be certainly
16 happy if we got something here, and we got a recognition
17 that the coercion doctrine exists; this is coercive; and
18 we get the remedy that you suggest in the alternative.

19 Let me just finish by saying I certainly
20 appreciate what the Solicitor General says, that when
21 you support a policy, you think that the policy spreads
22 the blessings of liberty. But I would respectfully
23 suggest that it's a very funny conception of liberty
24 that forces somebody to purchase an insurance policy
25 whether they want it or not.

1 And it's a very strange conception of
2 federalism that says that we can simply give the States
3 an offer that they can't refuse, and through the
4 spending power which is premised on the notion that
5 Congress can do more because it's voluntary, we can
6 force the States to do whatever we tell them to. That
7 is a direct threat to our federalism.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 Mr. Clement. And thank you, General Verrilli, Mr.
11 Kneedler, Mr. Carvin, Mr. Katsas, and in particular, of
12 course, Mr. Long and Mr. Farr.

13 The case is submitted.

14 (Whereupon, at 2:24 p.m., the case in the
15 above-entitled matter was submitted.)

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